

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 165 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

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SANJAYKUMAR VINODCHANDRA SHAH (JAIN)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 165 of 2001
MR YATIN SONI for Petitioner No. 1
MR HH PATEL, PUBLIC PROSECUTOR for Respondent No. 1
MR DIPAK R DAVE for MR KI ACHARYA for Respondent No. 2
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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 06/07/2001

ORAL JUDGEMENT

#. In response to notice, Shri Dipak R.Dave appears for respondent no.2 and Shri HH Patel, learned APP appears for respondent no.1. List has been revised four times, none appears for the revisionist. The revisionist is

also absent. However, the mother of the revisionist Smt.Nirmalaben V.Shah wanted to argue the matter though she is not revisionist. Yet, in the interest of justice, she was allowed to argue, inasmuch as, neither the revisionist is present nor his counsel and she states that she is unable to contact the counsel for the revisionist as his whereabouts are not known. As such, Smt.Nirmalaben V.Shah on behalf of the revisionist, Shri Dipak R.Dave for the respondent no.2 and Shri HH Patel, learned APP for the respondent no.1 have been heard on admission of this revision.

#. The order under revision has disposed of two applications, one for cancellation of bail and the other an application made by the revisionist for discharge under secs.406 and 420 of the Indian Penal Code. The application cancelling bail was rejected and that order is not under challenge in this revision. Only the order rejecting application for discharge of the revisionist under secs.406 and 420 of the Indian Penal Code is under challenge. Memo of revision has been examined, so also the impugned order has been read.

#. The first objection of Shri Dave is that the revisionist should have approached the Sessions Judge, inasmuch as, the order has been passed by the Judicial Magistrate and no special circumstance has been made out, why the High Court, in exercise of the concurrent jurisdiction, should entertain this revision, which in the ordinary course can be entertained and decided by the Sessions Judge. I find substance in the objection. After hearing the arguments, I find that no serious or complicated question of law is involved, which requires determination by the High Court. The revision could have been filed before the Sessions Judge. However, since notice was issued by this Court on 25-4-2001, I propose to enter into other objections and prima facie merits in the revision.

#. It is not a case where trial is pending before the Sessions Judge. As such, provisions of sec.227 of the Code of Criminal Procedure are not attracted and no order for discharge could be passed under this section.

#. The accused, revisionist has to face trial under secs.406 and 420 of the Indian Penal Code. Both the sections make provision for cognizable offences and trial of such offence is to be conducted as trial of warrant cases. In a warrant case, for discharging the accused, the Magistrate could have acted under sec.239 of the Code of Criminal Procedure. Sec.239 of the Code of Criminal

Procedure provides that, 'if upon considering the police report and the documents sent with it under sec.173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.'

After going through the impugned order, I find that the learned Magistrate has made effective compliance of sec.239 of the Code of Criminal Procedure. He had considered the police report and he had also considered the documents sent by the police under sec.173 of the Code of Criminal Procedure.

#. In the impugned order, the learned Magistrate has observed that on perusing the said charge-sheet and police papers of investigation, it becomes clear that there is prima facie case against the accused persons for the offences under secs.406 and 420 of the Indian Penal Code. He had also considered statement of the witnesses and also the reply of the owner of Single Transport and was of the opinion that there is no reason at all to believe their statements as false at this stage without recording evidence. Thus, the Magistrate has not only considered the police papers but, has also considered the statement of the witnesses recorded by the police and also the reply of the owner of Single Transport. He was of the opinion that this material can not be disbelieved at that stage. Accused was heard by the learned Magistrate.

#. The main contention of the revisionist before the trial Magistrate and that of his mother before this Court has been that, on the date when the offence was said to have been committed, the revisionist was at Patna and not at Unjha. This, in effect, amounts to plea of alibi, which could not be considered by the learned Magistrate at the stage of framing of charges. He has rightly opined that this matter can be considered at appropriate stage when evidence is recorded. It may also be mentioned that sec.239 of the Code of Criminal Procedure does not oblige a Magistrate to consider the evidence proposed to be tendered or tendered by the accused at the time of framing of charges. The only obligation on the part of the Magistrate is that opportunity of hearing is to be given to the accused. That was done in the instant case. Consequently, there is no violation of the provisions of sec.239 of the Code of Criminal Procedure. The Magistrate has not observed that the charge against

the accused is groundless.

#. At this stage, at 12:20 p.m., Shri Yatin Soni, learned counsel for the revisionist requested for hearing. He was heard.

#. His main contention is that, there is no material on record to show that 'Jira' was purchased by the revisionist. Shri Soni has also taken me through the written FIR. The written FIR itself details the dates, the quantity of 'Jira' purchased and also the price of 'Jira' purchased. The purchase was made on bills and not on cash basis. Consequently, no cash memo or copy of cash memo could be filed by the complainant. Copies of bills were produced in the course of investigation, which were considered by the Investigating Officer and the bills were also considered by the learned Magistrate. At this stage, the learned Magistrate was not required to give a definite finding, whether the quantity of 'Jira' was purchased, nor he was expected to write a detailed judgment. What was expected from him under sec.239 of the Code of Criminal Procedure, was to consider the police report, documents sent with it under sec.173 and after examining the same and hearing the accused and also hearing the prosecution, if he finds that the charge is groundless, then only he can discharge the accused. There is no finding in the impugned order that the charge is groundless. I find the observation of the Magistrate is that, there is prima facie case against the accused under secs.406 and 420 of the Indian Penal Code. He has also considered various decisions of the Apex Court on the point.

##. It is also contended by Shri Soni that it is a case of purely civil nature, hence, criminal action is totally unwarranted. This argument can not be accepted in view of the Apex Court's verdict in LALMUNI DEVI V. STATE OF BIHAR & ORS. reported in Judgements Today 2001(1) S.C. 150. This was also a case under secs.419, 420, 467 and 120(B) of the Indian Penal Code. The Apex Court has held in this case that, 'merely because a civil claim is maintainable, it does not mean that criminal complaint can not be maintained. Complaint could be quashed only if it does not make out an offence.' After examining the complaint in the nature of FIR before me, it can not be said that it does not disclose or make out any offence under secs.406 and 420 of the Indian Penal Code. Consequently, even if civil suit has been filed for recovery of price of the goods supplied to the revisionist, criminal prosecution is not barred.

##. Shri Dave has referred to the case of OM WATI V. STATE reported in (2001) 4 S.C.C. 333 and has argued as to how the courts have to act while dealing with the application for discharge. The Apex Court, in this case, has considered the provisions of secs.245 and 227 of the Indian Penal Code. As observed by me earlier, it is not a case covered by sec.227 of the Indian Penal Code, inasmuch as, it is not a case to be tried by the Court of Sessions. Likewise, sec.245 of the Code is also not applicable because, it was not a case initiated on a private complaint. On the other hand, it was initiated on police report after registering the FIR, hence, the trial is to proceed as warrant trial and provisions of sec.239 of the Criminal Procedure Code will be attracted. However, in this case, the Apex Court referring to a three-Judge Bench of the Supreme Court in SUPERINTENDENT & REMEMBRANCER OF LEGAL AFFAIRS, W.B. v. ANIL KUMAR BHUNJA AIR 1980 SC 52 has laid down as to how the courts have to act at the initial stage of framing of charges. The Apex Court has reminded the courts that at the initial stage of framing of charges, the prosecution evidence does not commence. The court has, therefore, to consider the question of framing the charges on general considerations of the material placed before it by the investigating agency. At this stage, the truth, veracity and effect of the judgment which the prosecution proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding an accused guilty or otherwise is not exactly to be applied at the stage of framing the charge. Even on the basis of a strong suspicion founded on materials before it, the court can form a presumptive opinion regarding the existence of factual ingredients constituting the offence alleged and in that event be justified in framing the charges against the accused in respect of the commission of the offences alleged to have been committed by them.

##. In view of this judgment of the Apex Court, it is difficult to accept the contention of Shri Soni, learned counsel for the revisionist, that the trial Magistrate should have considered the entire evidence including the plea of alibi raised by the revisionist and then, should have decided the application.

##. Shri Soni has further contended that the learned Magistrate has not considered all the points raised in the application for discharge, hence, it is a case where the matter should be remanded to the trial Magistrate for reconsideration of the application in accordance with law. In my opinion, remand of the matter is hardly

called for, inasmuch as, it would unnecessary delay the trial. The Magistrate has considered what was expected of him to be considered under sec.239 of the Code of Criminal Procedure.

##. In the result, I do not find any merit in this revision, which is hereby rejected.

July 6, 2001. (D.C. Srivastava, J.)

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